No. 98319-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID LADENBURG, in his capacity as a
Tacoma Municipal Court Judge,

Petitioner,

v.

DREW HENKE, in her capacity as the
Presiding Judge of the Tacoma Municipal Court,

Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons take an oath to uphold the Washington Constitution. WAPA's deep concerns about the unintended consequences that might flow from expanding this Court's original jurisdiction to judges of the courts of limited jurisdiction motivate the filing of this brief.

II. ISSUES PRESENTED

1. Whether this Court's article IV, § 4 "original jurisdiction in . . . mandamus as to all state officers" extends to judges of courts of limited jurisdiction?

2. Whether this Court has original jurisdiction over statutory writs of prohibition and/or mandamus?

III. AMICUS CURIAE'S STATEMENT OF THE CASE

This action stems from an order granting a motion filed by the criminal defendant in *City of Tacoma v. Nester*, Cause No. D49091 ("*Nester* case #1) to consolidate *Nester* case #1 with his other pending criminal matters. Mr. Nester's consolidation motion was heard by the GR 29 presiding judge. *See* Parties' Agreed Facts. This action, which is brought by

a non-party to *Nester* case #1,[1] seeks review of the presiding judge's order granting Mr. Nester's consolidation motion and seeks withdrawal of that order. *See, e.g.*, Brief of Petitioner Ladenburg, at 31. It is unclear whether Petitioner Ladenburg's requested remedy is merely symbolic, or if he seeks restoration in *Nester* #1 to the *status quo ante*.

The "Petition Against State Officer" was served solely upon the respondent presiding judge. *See* Petition Against State Officer Declaration. Despite the impact Petitioner Ladenburg's requested relief will have upon the parties in *Nester* #1, none of the pleadings filed with this Court have been served upon the prosecutor for the City of Tacoma in *Nester* # 1 nor Mr. Nester or his lawyer. Neither the City of Tacoma nor Mr. Nester have been made parties to this action. *See* Parties' Agreed Facts ¶¶ 1-2. Mr. Nester has not been provided with an opportunity to be heard in defense of the consolidation motion and order.

IV. ARGUMENT

A. Significant Public Policy Considerations Counsel Against Expanding this Court's Original Jurisdiction in Mandamus Actions to Judges of Courts of Limited Jurisdiction in Criminal Matters.

Recent years have seen an increasing number of original jurisdiction mandamus or prohibition actions filed in this Court. Two of these actions

[1] *See* Reply Brief of Petitioner Ladenburg at 17 ("A constitutional or statutory writ is also the only remedy available to Judge Ladenburg, who is not a party to the *Nester* cases and therefore has no standing to intervene and oppose consolidation. . .").

seek to expand the meaning of "state officers" as used in article IV, § 4 of the Washington Constitution to locally elected officials. *See Julian Pimentel v. The Judges of the King County Superior Court and Dan Satterberg, King County Prosecuting Attorney*, No. 98154-0 (prosecuting attorney), and *David Ladenburg v. Drew Henke*, No. 98319-4 (municipal court judges). WAPA believes that expanding this Court's original jurisdiction to a myriad of minor officials that operate local governments will unnecessarily divert already limited resources from this Court's appellate docket.

Extending this Court's original jurisdiction to judges of courts of limited jurisdiction creates another avenue of delay in both civil and criminal matters. The motion practice contemplated in RAP 16.2 and RAP 17.4 that applies to these actions can take weeks or months to complete. District or municipal court judges are likely to delay acting in the underlying action while a petition for original mandamus jurisdiction is pending.

When, as here, the original mandamus action is brought by a non-party, the parties to the underlying action could have their due process rights of adequate notice and a meaningful opportunity to be heard violated. This is because RAP 16.2, unlike RCW 7.24.110, does not require that all interested persons be made a party to the proceeding. There is also no mechanism in the Rules of Appellate Procedure for an interested person to intervene. *Compare* RAP 16.2 *with* CR 24. Nor is there a mechanism for

dismissing an original action for failure to join a person who has a specific interest in the matter and whose interest may be impaired by the original mandamus action. *Compare* RAP 16.2 *with* CR 19.

An original mandamus action filed by a non-party with respect to an on-going criminal matter can violate the defendant's Sixth Amendment right to determine how to present his case.[2] Such an action can also violate the doctrine of separation of powers by usurping the authority and discretion of the prosecution.

This case does not involve the *parties*' ability to invoke the original jurisdiction of this Court. The defendant or prosecution in a criminal case can invoke the appellate jurisdiction of either the superior court or this Court in an original action against the criminal court. But such appellate jurisdiction is predicated on this Court's revisory and appellate jurisdiction, not on the criminal judge being a "state officer." *See generally Seattle v. Rohrer*, 69 Wn.2d 852, 853, 420 P.2d 687 (1966) (supreme court exercising its "revisory and appellate" jurisdiction with respect to a municipal court judge); *O'Connor v. Matzdorff*, 76 Wn.2d 589, 458 P.2d 154 (1969) (supreme court exercising appellate jurisdiction as to Yakima Justice Court judge); Wash. Const. art. IV, § 4 (granting supreme court appellate

[2]Defendants are among the people the prosecutor represents and the prosecutor has a duty to ensure that defendants' constitutional and statutory rights are not violated. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (citations omitted).

jurisdiction in all actions); Wash. Const. art. IV, § 6 (superior courts "shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law"); Chapter 7.16 RCW (granting superior courts jurisdiction to issue writs of certiorari, mandamus, and prohibition to courts of limited jurisdiction); RAP 4.3 (authorizing direct review in the Supreme Court of a decision of a court of limited jurisdiction); RALJ 2.2 (appeals as of right to superior court from certain decisions of a court of limited jurisdiction).

To clarify, the latter portion of article IV, § 4 grants this Court the jurisdiction to consider an original action against any court in the exercise of its appellate or revisory jurisdiction, but such a writ would have be filed by an "aggrieved" party. *See generally State ex rel. Simeon v. Superior Court,* 20 Wn.2d 88, 90, 145 P.2d 1017 (1944); RAP 3.1. A judge whose ruling is being challenged is not an "aggrieved" party and is not a participant in the appeal. *See, e.g., Municipal Court v. Superior Court (Gonzalez),* 5 Cal. 4th 1126, 857 P.2d 325 (1993) ("In a mandamus proceeding, it is the parties [in the underlying proceeding], not the courts [whose rulings are challenged], which have a 'beneficial interest' in the outcome of a case; the role of the respondent court is that of a neutral party."); *Municipal Court v. Superior Court*, 202 Cal. App. 3d 957, 249 Cal. Rptr. 182 (1988) (judges lack a sufficient beneficial interest in the matter to have standing to sue; the lower

court judge's interest in his/her personal power is outweighed by the damage to the appearance of impartiality in the system).

The rights of the parties to the underlying action should be preserved, including their right not to seek relief or have the matter delayed by non-parties. An aggrieved criminal defendant may elect not to seek immediate interlocutory review of an adverse order. The defendant may not wish to prolong pre-trial detention or the uncertainty and stress associated with an unresolved criminal matter. S/he may be afraid that defense evidence will become unavailable during any delay. A defendant may believe that the order, though adverse, does not significantly impact his or her chances of acquittal. Finally a defendant who has retained private counsel may incur additional costs due to an original action brought by a non-party. This Court has cautioned that pursuant to the Sixth Amendment courts must honor the strategic choices of a criminal defendant out of respect for individual dignity and autonomy. *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013).

Similarly, an aggrieved prosecuting authority may elect not to seek immediate interlocutory review in order to conserve limited resources for other purposes. This Court has recognized the broad discretion granted to prosecutors in fulfilling their fundamental role to seek individualized justice, manage resource limitations and prioritize competing prosecutions. *State v. Rice*, 174 Wn.2d 884, 901-02, 279 P.3d 849 (2012). A prosecutor may wish

to avoid delay due to the risk of losing evidence or out of respect for a victim's wishes. The prosecutor may determine that a speedy resolution that requires the defendant to immediately participate in rehabilitative counseling or treatment is in the best interest of justice. Allowing an original action to be filed by a non-party would usurp the prosecutor's discretion.

Finally, the type of original action presented here creates administrative problems for the court of limited jurisdiction. In an appeal, the judge is not a party to the proceeding. However, in an original jurisdiction in mandamus, the judge becomes a named party and the city attorney's office or the prosecuting attorney's office is likely to represent the respondent judge. While the client judge will not have to recuse from all cases in which the city attorney's office or the prosecuting attorney's office appears during the representation, the client judge must recuse from all cases in which the particular attorney who is representing him in the matter appears. *See generally* Ethics Advisory Committee Opinion 95-12 (Mar. 1995).[3] In smaller jurisdictions where the duties of the client judge's attorney includes criminal jurisdiction, the respondent judge in the original mandamus jurisdiction matter may be unable to preside over a large percentage of cases.

[3]Available at http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=9512 (last visited Dec. 18, 2020).

B. Judges of Courts of Limited Jurisdiction Are Not "State Officers" Who Are Subject to this Court's Article IV, § 4 Original Jurisdiction.

Article IV, § 4 defines the jurisdiction of this Court. It provides, in relevant part, that "The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers. . . " Wash. Const. art IV, § 4. The original jurisdiction granted by the first sentences of article IV, § 4 is thus limited to these enumerated writs directed to state officers. *State ex rel. Hollenbeck v. Carr*, 43 Wn.2d 632, 635, 262 P.2d 966 (1953). An original action filed in this Court against a non-state officer must be dismissed for want of jurisdiction. *Id.* at 638.

In determining the meaning of the phrase "state officer" in article IV, § 4, this Court looks to the intent of the framers, the history of the events and proceedings contemporaneous with its adoption. *Yelle v. Bishop*, 55 Wn.2d 286, 291, 347 P.2d 1081 (1959). The words of the text of the constitution will be given their common and ordinary meaning, as determined at the time they were drafted. *Washington Water Jet Workers Association v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004). The meaning of a term in the Constitution does not prevent the legislature from using a different definition for the term in a statute. *See, e.g., Grant County Prosecuting Attorney v. Jasman*, 183 Wn.2d 633, 642, 354 P.3d 846 (2015) (construction of the term "public officer" in the constitutional context does not extend to the term

"public officer" in the context of the forfeiture statute). Legislation alone, however, is insufficient to alter the constitution. *See, e.g., State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 182, 385 P.3d 769 (2016) (legislation insufficient to authorize a private attorney to perform the duties of the prosecuting attorney).

To determine whether a person occupying a particular public office is a "state officer" for purposes of the Washington Constitution, this Court has focused on particular factors including: (1) whether the person occupying the office is subject to impeachment pursuant to article V of the Washington Constitution; (2) whether vacancies in the office are filled by the governor; (3) whether the state constitution created the office; (4) whether the constitution placed responsibility on the state for a portion of the salary for the position; (5) whether the occupant of the position exercises state authority; and (6) whether the occupant of the position is subject to state control. *See, e.g., State ex rel. Edelstein v. Foley*, 6 Wn.2d 444, 107 P.2d 901 (1940) (superior court judges are state officers for purposes of article IV, § 4 due to the character and extent of their jurisdiction and the locality in which they may be called upon to discharge their duties as such officers, and because the constitution provides that the state pays at least part of their salary, and that vacancies occurring in the office are to be filled by the governor); *State ex rel. McMartin v. Whitney*, 9 Wash. 377, 37 P. 473 (1894)

(prosecuting attorneys are not state officers for purposes of article III, § 13 because the position pre-existed the constitution, the first election for the position did not take place in 1892, and the county commissioners fill vacancies in office); *State ex. rel. Stearns v. Smith*, 6 Wash. 496, 33 P. 974 (1893) (article IV, § 4 original jurisdiction over "state officers" is limited to positions in which the office holder is subject to impeachment pursuant to article V, § 2 of the Washington Constitution); *State v. Twichell*, 4 Wash. 715, 31 P. 19 (1892) (superior court judges are state officers as the position was created in the Washington Constitution, vacancies in the office are filled by the governor, and the constitution provides that the state is responsible for one half of the salary of the judge). Consideration of these factors leads to only one conclusion in this case–judges of courts of limited jurisdiction are not "state officers" for purposes of article IV, § 4.

1. Judges of Courts of Limited Jurisdiction Are Article IV, § 10 "Justices of the Peace"

Today, Washingtonians are served by a number of "courts of limited jurisdiction"[4] created by the legislature that are presided over by "district court judges" or "municipal court judges." None of these phrases appear in the Washington constitution. These phrases can, however, be traced to their constitutional counterparts.

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[4]A "'court of limited jurisdiction' is any court organized under Titles 3, 35, or 35A RCW." RCW 3.02.010.

The Washington constitution authorizes the legislature to create "inferior courts" that are not "courts of record" and that are presided over by "justices of the peace" or "police justices." *See* Wash. Const. art. IV, §§ 10, 11, and 12. Pursuant to these provisions the early legislature adopted statutes that referred to "courts of justices of the peace," "police justices," and "justice courts" or "police courts." *See, e.g.,* Laws of 1889-1990, §§ 95-96, 102, 138, and 174, at pgs. 172-175, 178, 196-97, and 214; Laws of 1891, ch. 48, § 4; Laws of 1897, ch 66, § 1; Laws of 1909, ch. 145, § 1. These statutes supplemented the pre-statehood statutes which continued in full force pursuant to article XXVII, § 2. *See generally Moore v. Perrott*, 2 Wash. 1, 3, 25 P. 906 (1891) (territorial statutes regarding justice courts continued in force to the extent they are not repugnant to the constitution); Code of 1881, Chapters 116 and 117; Laws of 1854, pgs. 222-25.

In later years, the legislature replaced these statutory phrases with our modern versions. *See, e.g.,* Laws of 1980, ch. 162, § 6 (replacing the phrase "in courts of justices of the peace" with the phrase "in courts of limited jurisdiction"); Laws of 1984, ch. 258, § 73 (former RCW 3.46.020) (replacing the phrase "justice of the peace" with "judge of the district court."). The new nomenclature, however, was not intended to sever the connection to the relevant constitutional provisions. *See, e.g.,* RCW 3.30.015 ("All references to justices of the peace in other titles of the Revised Code of

Washington shall be construed as meaning district judges. All references to justice courts or justice of the peace courts in other titles of the Revised Code of Washington shall be construed as meaning district courts."); RCW 3.30.030 ("The judges of each district court shall be the justices of the peace of the district. . ."); Laws of 1961, ch. 299, § 36 ("Each judge of a municipal department shall be a judge of the district court in which the municipal department is situated. Such judge may be alternatively designated as a municipal judge or police judge.").

The question before this Court, therefore, is whether justices of the peace, police judges, or judges of other inferior courts were intended to be "state officers" for purposes of article IV, § 4 by the drafters of the constitution. This Court has already answered "no" in similar contexts. *See In re Bartz*, 47 Wn.2d 161, 287 P.2d 119 (1955) (justices of the peace are not a "state officer" as that term is used in Wash. Const. art. III, § 25); *State ex rel. Moody v. Cronin*, 5 Wash. 398, 31 P. 864 (1892) (justices of the peace is a precinct officer for purposes of Wash. Const. art. XI, § 6).

2. Judges of Courts of Limited Jurisdiction Are Elected Locally and their Jurisdiction Is Extremely Constrained

From territorial days until the present justices of the peace, police judges, and other judicial officers who preside over courts of limited jurisdiction have either been elected by the qualified voters of the precinct, county, or municipality or appointed by local officials. *See, e.g.,* Code of

1881, ch. 116, § 1689 ("The qualified voters of each election precinct, in the several organized counties of this territory, shall at the time and place of holding the general election, elect one or more justices of the peace;"); RCW 3.34.050 (district court judges to be elected by district); Former 35A.20.010 (code cities to elect or appoint municipal judge or police judges); Laws of 1984, ch. 258, § 76 (former RCW 3.46.070);[5] RCW 3.50.050 (municipal judges shall be elected in the same manner as other elective city officials are elected to office); RCW 35.20.150 (election of municipal judges).

The jurisdiction of these judicial officers has been limited both geographically and by subject matter since territorial days. *See, e.g., State v. Haye*, 72 Wn.2d 461, 433 P.2d 884 (1967) (constitution restricts the matters that a court of limited jurisdiction may hear to those that do not entrench on the superior court's original jurisdiction); *Ex parte Crawford*, 148 Wash. 265, 268 P. 871(1928) (justice of the peace's "territorial jurisdiction is confined to their respective counties;" arrest warrant issued by a justice of the peace in one county could not be lawfully executed in another county); *State v. Davidson*, 26 Wn. App. 623, 613 P.2d 564 (1980), *abrogated in part by* RCW 2.20.030 (the boundaries of the county ordinarily define a district court's jurisdiction in criminal matters; search warrant issued by a district

[5]This statute which was repealed by Laws of 2008, ch. 227, § 12, applies to the Tacoma Municipal Court pursuant to RCW 3.46.015 and Tacoma Ordinance No. 28362. Former RCW 3.46.070 states, in relevant part, that "Only voters of the city shall vote for municipal judges."

court judge for a location in another county is invalid); Code of 1881, ch. l17, § 1706 ("The jurisdiction of all justices of the peace shall be co-extensive with the limits of the county in which they are elected, and no other or greater unless otherwise expressly provided by statute."); Code of 1881, ch. 131, § 1886 ("The jurisdiction of justices of the peace in criminal prosecutions, shall be co-extensive with their respective counties"); Laws of 2005, ch. 282, § 13 (former RCW 3.46.030);[6] RCW 3.50.020; RCW 3.66.020 and .030 (civil jurisdiction of district court judges); RCW 3.66.060 (criminal jurisdiction of district courts); RCW 35.20.030 (jurisdiction of municipal court largely limited to violations of all city ordinances and all other actions brought to enforce or recover license penalties or forfeitures declared or given by any such ordinances).[7]

3. The Salary of Judges of Courts of Limited Jurisdiction Are Solely the Responsibility of the City or County

Article IV, § 13 of the Washington Constitution determines how judicial salaries shall be paid. This provision requires the state to pay one

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[6]This statute which was repealed by Laws of 2008, ch. 227, § 12, applies to the Tacoma Municipal Court pursuant to RCW 3.46.015 and Tacoma Ordinance No. 28362. Former RCW 3.46.030 states, in part, that "A municipal department shall have exclusive jurisdiction of matters arising from ordinances of the city, and no jurisdiction of other matters except as conferred by statute."

[7]Since 1955 a court organized pursuant to chapter 35.20 RCW has "concurrent jurisdiction with the superior court and district court in all civil and criminal matters as now provided by law for district judges." RCW 35.20.250. A municipal court may only be organized under chapter 35.20 RCW if it has a population of more than 400,000 inhabitants. RCW 35.20.010.

half of the salary of each of the superior court judges. *Id.* ("One-half of the salary of each of the superior court judges shall be paid by the state, and the other one-half by the county or counties for which he is elected."). The constitution, however, does not mandate that the state pay any portion of the salary of a justice of the peace. *Id.* In fact, the constitution allows for "unsalaried justices of the peace." *Id. See also In re Borchert*, 57 Wn.2d 719, 359 P.2d 789 (1961) (justices of the peace in smaller jurisdictions may be compensated solely from fees).

To the extent the legislature mandated that a salary be paid to a justice of the peace, the early statutes placed the responsibility for making such payments solely upon the city or county that the justice of the peace served. *See, e.g.,* Laws of 1891, ch. 7, § 7 (salaries of the justices of the peace shall be paid out of the county treasury); Laws of 1899, ch. 85, § 7, at 136 (salary of police judge "shall be paid wholly out of the fund of the city"). In subsequent years, the legislature continued to make counties and cities solely responsible for paying the salary of justices of the peace. *See* RCW 3.50.080; RCW 3.62.050; RCW 35.20.160 (salaries of municipal judge to be paid by city); RCW 3.34.025 (costs of any additional district court judges shall be paid out of county funds without reimbursement from the state); Laws of 1955, ch. 11, § 13 (salaries of the justices of the peace shall be paid out of the county treasury); Former RCW 35A.20.020 ("The compensation of a police

judge or municipal judge shall be . . .paid wholly out of the funds of the code city."). The salaries of both the petitioner and the respondent to this original action are solely the responsibility of the City of Tacoma. Laws of 1984, ch. 258, § 78 (former RCW 3.46.090).[8]

One hundred and sixteen years after the ratification of the Washington constitution, the state began to voluntarily contribute funds toward the payment of district court and municipal court judge's salaries. *See* Laws of 2005, chapter 457, § 8(2)(a)(iv) (amending RCW 43.08.250). The funds contributed by the legislature for this purpose do not constitute a fixed portion of the salary of a judge of a court of limited jurisdiction and may be reduced or eliminated by the legislature at any time. *See generally* Laws of 2005, chapter 457, § 7(20)(a) (amending RCW 2.56.030) (requiring the administrator for the courts to "develop a distribution formula" for "amounts appropriated from the equal justice subaccount under RCW 43.08.250(2)[9] for district court judges' and qualifying elected municipal court judges' salaries").

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[8]This statute which was repealed by Laws of 2008, ch. 227, § 12, applies to the Tacoma Municipal Court pursuant to RCW 3.46.015 and Tacoma Ordinance No. 28362. Former RCW 3.46.090 states, in relevant part, that "The salary of a full time municipal judge shall be paid wholly by the city."

[9]In 2009, this special account was consolidated with the state general fund. *See* Laws of 2009, chapter 479.

4. Judges of Courts of Limited Jurisdiction Are Not Subject to Impeachment

Article V of the Washington Constitution governs impeachment and distinguishes between state officials that are liable to impeachment and all other officers that are not liable to impeachment. The officers that are liable to removal by impeachment are identified in section 2 as follows:

> The governor and other state and judicial officers, *except judges and justices of courts not of record*, shall be liable to impeachment for high crimes or misdemeanors, or malfeasance in office, but judgment in such cases shall extend only to removal from office and disqualification to hold any office of honor, trust or profit, in the state. . . .

Wash. Const. art. V, § 2 (emphasis added).

Consistent with the plain language of article V, § 2, this Court has held that a justice of the peace is not subject to impeachment. *State ex rel Evans v. Superior Court*, 92 Wash. 375, 380, 159 P. 84 (1916) (noting that the justice of the peace was "an executive officer of the city"). The exclusion from impeachment extends to all persons who perform any of the judicial functions of courts not of record, regardless of their title. *See Municipal Court of Seattle ex rel. Tuberg v. Beighle*, 96 Wn.2d 753, 755-56, 638 P.2d 1225 (1982). All courts of limited jurisdiction, municipal and district, are "courts not of record." *See generally Seattle v. Filson*, 98 Wn.2d 66, 70-71, 653 P.2d 608 (1982), *overruled on other grounds by In re Eng*, 113 Wn.2d 178, 189, 776 P.3d 1336 (1989).

5. Vacancies in a Judicial Position on a Court of Limited Jurisdiction Are Filled by the County or City Legislative Authority

The Washington Constitution vests the responsibility for filling vacancies on courts of record in the governor. *See* Const. art. IV, § 3 (supreme court); Const. art. IV, § 5 (superior court); Const. art. IV, § 30 and RCW 2.06.080 (court of appeals). The Washington Constitution also vests the responsibility for filing vacancies in other state offices for which the constitution does not otherwise make provisions in the governor. *See* Const. art. III, § 13.

The constitution, however, assigns the governor no part in filling vacancies on courts of limited jurisdiction. Instead, the constitution assigns the responsibility for filling vacancies in the office of the justice of the peace with the county commissioners. In *State ex rel. Moody v. Cronin*, 5 Wash. 398, 31 P. 864 (1892), this Court explained that while justices of the peace are judicial officers, they are also a county or precinct officer. Thus, a vacancy in the office of the justice of the peace shall be filled by appointment of the county commissioners pursuant to article XI, § 6 of the Washington Constitution. *State ex rel. Caplan v. Bell*, 185 Wash. 674, 56 P.2d 683 (1936); *State ex rel Moody*, 5 Wash. at 398.

Consistent with this Court's holding that justices of the peace are local officers, the legislature placed the responsibility for filling vacancies on

all inferior courts upon the mayor, municipal legislative authority, or the county legislative authority that is served by the justice of the peace, police judge, or municipal judge. *See, e.g.,* RCW 3.34.100 (county legislative authority to fill district court vacancies); RCW 3.50.093 (mayor to fill municipal judge vacancies); RCW 35.20.150 (same); Laws of 1984, ch. 258, § 79 (former RCW 3.46.100) (same).[10] These modern statutes are consistent with the statutes that first created the positions of justices of the peace and police court judges which vested responsibility for filling vacancies with the local electorate or local legislative authorities. *See, e.g.,* Laws of 1854, pg. 224, § 8 (justice of the peace vacancies to be filled "by the board of commissioners of the proper county"); Code of 1881, ch. 116, § 1696 (voters of the precinct); Laws of 1889-1990, §108 at pag. 180 (vacancies in police judges to be filled by the city council).

In sum, consideration of the factors that this Court has previously relied on as determinative as to who is a state officer for purposes of article IV, § 4, leads to the conclusion that Tacoma Municipal Court Judge Henke is not a state officer.

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[10]This statute, which was repealed by Laws of 2008, ch. 227, § 12, applies to the Tacoma Municipal Court pursuant to RCW 3.46.015 and Tacoma Ordinance No. 28362. Former RCW 3.46.100 states, in relevant part, that "A vacancy in a position of full time municipal judge shall be filled for the unexpired term by appointment in such manner as the city may determine."

C. This Court Does Not Have Original Jurisdiction over a Statutory Writ

Because Judge Henke is not a state officer for purposes of article IV, § 4, any writ of mandamus or prohibition against her is a statutory writ. Original jurisdiction over statutory writs lies with the superior court, not this Court.

During the early years of statehood, this Court considered the scope of its original jurisdiction pursuant to article IV, § 4. In the 1901 case of *Winsor v. Bridges*, 24 Wash. 540, 64 P. 780 (1901), a person filed an original action for a writ of prohibition in this Court against the board of state land commissioners. The Court dismissed the original action, holding that the writ of prohibition referred to in article IV, § 4 was the common law writ and could not be issued to restrain an executive, administrative, or legislative act.

In its opinion, this Court acknowledged that the legislature had enacted statutes to regulate the practice in certiorari, mandamus, and prohibition, and that these statutory writs were extended beyond the common law writs. *Winsor*, 24 Wash. at 546. The Court held, however, that the statutory writs could not alter or expand its article IV, § 4 jurisdiction. *Winsor*, 24 Wash. at 546-47 (citing to *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60, 1 Cranch 137 (1803)). In other words, this Court's article IV, § 4 original jurisdiction is limited to the named writs as those writs existed at common law.

An action brought pursuant to the expanded statutory writs of mandamus and prohibition must be filed in the superior court. *Winsor*, 24 Wash. at 547-548 (superior courts have original jurisdiction over the expanded statutory writs of prohibition under the "such special cases and proceedings as are not otherwise provided for" clause of article IV, § 6). While this Court will inquire into the merits of the issue raised in such a statutory writ on appeal, it will dismiss statutory writs filed directly with the Court for lack of original jurisdiction. *Winsor*, 24 Wash. at 548-49.

V. CONCLUSION

This Court's precedents show that judges of courts of limited jurisdiction are not "state officers" for purposes of this Court's original article IV, § 4 mandamus jurisdiction. This Court's precedents further show that original jurisdiction over statutory writs of mandamus and prohibition is vested only in the superior court. These precedents are neither wrong nor harmful and should be reaffirmed by this Court.

Respectfully submitted this 28th day of December, 2020.

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PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 28th day of December, 2020, an electronic copy the document to which this proof of service is attached was served upon the following individuals via the CM/ECF System and/or e-mail:

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Signed under the penalty of perjury under the laws of the state of Washington this 28th day of December, 2020, at Port Orchard, Washington.

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